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Introduction

The erroneous purges of voter rolls in 2000 without notice to the purged voters had the hideous consequence that properly registered voters went to the polls expecting to vote as in the past, only to be turned away—disenfranchised—because their names had been improperly removed from the voter lists.¹ To prevent this situation from ever occurring again in federal elections, Congress adopted a system of provisional voting as part of the Help America Vote Act of 2002 (“HAVA”).² This system establishes that whenever a person goes to the polls and the poll workers cannot find that individual’s name on the list of registered voters, that person receives a provisional ballot.³ These provisional ballots will be included in the final results of the election if the local election board subsequently determines that the individual was entitled to vote.⁴ Conversely, if it turns out upon further examination that the individual was indeed not entitled to vote, the provisional ballot is rejected and does not count in the final election results.⁵

The idea of provisional voting was a necessary and appropriate response to the purges of 2000. Registered voters should have a form of insurance against administrative errors of which they have received no prior notice. But Congress insufficiently developed the particular system of provisional voting that it adopted in 2002, as the election of 2004 revealed.⁶

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¹ See Symposium, *The End of the Beginning for Election Reform*, 9 GEO. J. ON POVERTY L. & POL’Y 285, 320–21 (2002) (referring to individuals who arrived at the election polls to find that their names had been removed from the voter lists).

² Help America Vote Act of 2002 § 302, 42 U.S.C.A. § 15482 (West Supp. 2005).

³ *Id.* § 15482(a)(1)–(2).

⁴ *Id.* § 15482(a), (a)(4).

⁵ DEMOS, ELECTION DAY REGISTRATION: HELPS AMERICA VOTE (2004), http://www.demos-usa.org/pubs/EDR_-_Toolkit.lr.pdf.

⁶ See James Dao et al., *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. TIMES, Dec. 24, 2004, at A1 (referring to the viewpoint held by voters’ rights organizations that election problems in Ohio in 2004 “underscored shortcomings” in HAVA).

This underdevelopment caused ambiguities, which in turn invited litigation.⁷ If President Bush's margin of victory among regular ballots in Ohio on the morning of November 3 had been half as large as it was—68,241 instead of 136,483 votes⁸—there likely would have been intense litigation over provisional ballots during the entire month of November and perhaps into December. This in turn may have led to the spectre of another decisive U.S. Supreme Court decision on the eve of the Electoral College “safe harbor” deadline.⁹ Thousands of lawyers were at the ready, armed with numerous theories for disputing the standards and procedures for determining which provisional ballots should count and which should not.¹⁰ These theories were available because of the inadequacies of the provisional voting provisions set forth in HAVA.

These problems must be solved before 2008. Otherwise, in the event of another close presidential election, the nation faces the risk of a voting system that cannot produce a winner without judicial intervention of the kind that makes the occupant of the White House seem less than fully entitled to that office. The challenge, then, within the next couple of years is to retain the essential “insurance policy” element of provisional voting while ridding it of the ambiguities that invite destabilizing and delegitimizing litigation.¹¹

I. Two Different Visions of Provisional Voting

HAVA was a compromise that papered over a profound difference of opinion between two alternative philosophies concerning provisional voting. One philosophy we can call the “substantive” vision of provisional voting. Its proponents believe that a provisional ballot should count whenever the individual who casts the ballot is someone who substantively has the qualifications necessary to be a registered voter: the individual is a

⁷ See Edward B. Foley, *HAVA's History Sheds Light on Provisional Voting Dispute*, at http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules10.html (Oct. 5, 2004) (describing how the lack of clarity in HAVA led to litigation over whether voters should receive a provisional ballot when they travel to the incorrect precinct to vote), in *THE E-BOOK ON ELECTION LAW: AN ONLINE REFERENCE GUIDE*, at <http://moritzlaw.osu.edu/electionlaw/ebook/toc.html>.

⁸ Mark Niquette, *Kerry's Concession a Numbers Game: Outstanding Votes Wouldn't Be Enough, He Decided*, COLUMBUS DISPATCH, Nov. 4, 2004, at 11A. The margin in Wisconsin on November 3 was one-tenth the margin in Ohio, with Kerry beating Bush in Wisconsin by just 11,813 votes. See *State-by-State Voting Totals*, CHI. TRIB., Nov. 4, 2004, at 4.

⁹ See Mark Niquette, *Judge Asks for More Arguments in Election Case: Sides Must Submit Why Presidential Challenge Matters After Electoral Vote*, COLUMBUS DISPATCH, Dec. 23, 2004, at C4 (referring to December 7, 2004, as “the ‘safe harbor’ date when any disputes about the choice of the state’s representatives to the Electoral College must be resolved”).

¹⁰ See, e.g., Dao et al., *supra* note 6.

¹¹ See *supra* notes 6–7 and accompanying text.

citizen, is over eighteen years old, is not a felon (where that qualification applies), and the like.¹²

The substantive vision makes provisional voting essentially the same as a system of “election day registration,” whereby citizens may register to vote on election day (they would register when they go to the polls to vote).¹³ If an individual had failed to supply important information on a voter registration form, causing the local election board to omit the individual from its registration rolls, then, according to the substantive vision, provisional voting would rectify the voter’s mistake. When evaluating the provisional ballot, election officials would see that the individual is someone who possesses all of the necessary qualifications of a registered voter and, therefore, that the provisional ballot should count along with the rest of the ballots cast by qualified voters.

It then logically follows from this substantive vision of provisional voting that the failure to submit a properly completed registration form is merely a procedural defect that should not bar an otherwise qualified individual from participating in the election, especially when that individual undertakes the civic responsibility of going to the polls on election day (voter turnout is something to be encouraged, after all). Likewise, according to this substantive vision, it should not matter if the individual’s voter registration form gets lost in the mail and never arrives at the board of elections or even if the voter never fills out a voter registration form ahead of time. Such a view would suggest that as long as it can be demonstrated after election day that the individual qualifies for registration, the state should include the individual’s provisional ballot in the official results for the election; therefore, this substantive vision of provisional voting is functionally equivalent to election day registration.¹⁴

The competing philosophy of provisional voting, by contrast, can be described as a “procedural” vision. In this view, the provisional ballot should count only if the individual who casts it is already a properly registered voter.¹⁵ This means that if the local election board never officially registered an individual because of an incomplete registration form or a registration form that the post office lost in the mail, the individual is out of luck—as would be true if the individual had never even attempted to submit a registration form. Only if the individual had

¹² See generally Symposium, *The End of the Beginning for Election Reform*, *supra* note 1, at 342–43 (2002) (discussing “substantive” criteria that states may use to define a person as an eligible voter).

¹³ See *id.* at 320–21 (explaining the system of election day registration as well as its benefits and drawbacks).

¹⁴ DEMOS, *supra* note 5 (explaining election day registration in detail).

¹⁵ See 148 CONG. REC. S10,493 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (stating during the U.S. Senate debate on HAVA that “the provisional ballot will be counted only if it is determined that the voter was properly registered”).

correctly and successfully taken all the necessary steps required for placement on the registration rolls would the provisional ballot count in the event that afterwards the election board inadvertently (or otherwise wrongfully) removed this properly registered individual from the rolls.¹⁶

The procedural vision of provisional voting thus protects citizens only when administrative error causes their names to be omitted from the official lists at the polls.¹⁷ This would mean that if an omission were to be caused by voter error (in failing to supply necessary information on the registration form or otherwise) or by third-party error (as when the post office loses the form in the mail or an independent get-out-the-vote group, like the “527 organizations” that actively participated in the 2004 election, fails to deliver to the board of elections all the forms it collected), the individual would be stuck with the consequences. This individual would suffer even though the individual is undoubtedly one who would have qualified for registration had the necessary procedures been correctly and successfully completed.

In the process of considering HAVA, the House of Representatives essentially adopted the substantive vision of provisional voting, whereas the Senate embraced the procedural vision.¹⁸ During the House-Senate conference, the Senate prevailed in its insistence on the narrower, more restrictive approach to provisional voting.¹⁹ But the ultimate language of HAVA that both the House and the Senate passed and the president signed is sufficiently generic that it arguably embodies the substantive rather than the procedural vision of provisional voting.²⁰

For example, HAVA uses the term “eligible” rather than “registered” to describe the person whose provisional ballot must be counted.²¹ Section 302(a)(4) of HAVA, codified at 42 U.S.C.A. § 15482(a)(4), states: “If the appropriate State or local election official . . . determines that the individual is *eligible* under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.”²² Furthermore, elsewhere within the same section of HAVA, Congress used the term “registered voter,” recognizing that it has a distinct meaning from the phrase “eligible to vote.”²³ Consequently, or so the argument goes, the

¹⁶ See Foley, *supra* note 7, para. 14 (describing the view that “voters must comply with all relevant state laws in order for their ballots to be counted”).

¹⁷ See *id.* (referring to Senator Kit Bond’s (R-MO) view that the only instance in which provisional ballots should be counted is if election officials erroneously removed a registered voter from the voter rolls).

¹⁸ See *id.* paras. 6–17 (analysis of HAVA’s legislative history).

¹⁹ *Id.* paras. 12, 23–27.

²⁰ *Id.* paras. 1–5.

²¹ 42 U.S.C.A. § 15482(a) (West Supp. 2005).

²² *Id.* § 15482(a)(4) (emphasis added).

²³ *Id.* § 15482(a)(2)(A)–(B).

provisional ballot must count not just when the individual is a registered voter, but whenever the individual possesses the qualifications necessary to be “eligible to vote.”

For present purposes, it matters not whether this argument reflects the better reading of HAVA and its legislative history or contradicts the proper understanding of the statute and the developments that transpired in Congress leading up to the statute’s enactment. Rather, the key point is that the argument is plausible on the face of the statute.²⁴ This is enough to make the argument very much worth litigating in a close election in the hope that a sympathetic judge will accept it. As this Article reviews, advocates were ready to press that argument and many more if the election night returns from regular ballots in Ohio had been just a bit closer in the presidential race.²⁵

II. Preelection Signs of Postelection Litigation Possibilities

Even before election day, there was plenty of litigation in an effort to place both incumbent President Bush and challenger Senator Kerry in the most advantageous position to prevail.²⁶ Forces aligned with the Democratic Party made a particular effort to place on the official list of registered voters the names of individuals who had filled out registration forms that were defective for one reason or another. In some cases, these individuals had failed to include on the registration form their driver’s license number or the last four digits of their Social Security number.²⁷ In other cases, individuals had failed to attest properly that they were U.S. citizens.²⁸

Local Democrats and allied groups filed several cases in Ohio seeking injunctive relief that would order the names of these individuals to be added to the list of registered voters before election day, which would have enabled these individuals to vote a regular rather than a provisional ballot.²⁹ The complaints in these cases alleged that the State’s refusal to register individuals because of these easily remedied defects in their registration

²⁴ See *id.* § 15482; *supra* notes 20–23 and accompanying text.

²⁵ See Dao et al., *supra* note 6 (referring to watchdog groups filing lawsuits regarding Ohio’s provisional ballots in the 2004 election).

²⁶ See, e.g., Deborah Hastings, *Lawsuits Already Filed over Election Issues*, CINCINNATI POST, Oct. 21, 2004, at 7A (referring to multiple lawsuits filed by Republicans and Democrats leading up to the 2004 elections).

²⁷ See, e.g., *Lucas County Democratic Party v. Blackwell*, 341 F. Supp. 2d 861, 862–63 (N.D. Ohio 2004).

²⁸ Cf. *Diaz v. Hood*, 342 F. Supp. 2d 1111, 1113 (S.D. Fla. 2004).

²⁹ See, e.g., *Lucas County Democratic Party*, 341 F. Supp. 2d at 863; see also Verified Complaint, *Citizens Alliance for Secure Elections v. Vu*, No. 1:04CV2147 (N.D. Ohio Oct. 25, 2004), <http://news.lp.findlaw.com/hdocs/docs/election2004/casevu102504cmp.pdf>.

forms affected some 14,000 voters.³⁰ These lawsuits were unsuccessful as the names were not added to the list of registered voters and the affected individuals were unable to vote a regular ballot on election day, but these defeats did not decide the question of what would happen to provisional ballots cast by these individuals.³¹

Democrats also made clear before election day their willingness to litigate issues relating to provisional ballots. The main issue early on was the so-called “wrong precinct” issue—whether voters would receive a provisional ballot if they mistakenly went to the wrong precinct on election day.³² Ohio Secretary of State Ken Blackwell had ruled that voters should not receive a provisional ballot in this instance but instead should be redirected to their correct precinct to cast a regular ballot, as any provisional ballot cast in the wrong precinct would be rejected under state law and thus excluded from the official count.³³ The Democrats most wanted a judicial ruling that would have required Blackwell to count provisional ballots cast in the wrong precinct.³⁴ But they accepted as a significant victory a Sixth Circuit ruling that ordered Blackwell to give provisional ballots to voters in the wrong precinct if voters insisted on them.³⁵ After all, if these “wrong precinct” provisional ballots would end up proving decisive in who won or lost the White House, the Democrats surmised that in the court of public opinion the country would not tolerate disenfranchising eligible citizens who made an effort to vote but just went to the wrong place (often merely standing in the wrong line at the proper gymnasium or other poll location) because officials had not made it sufficiently clear where the voters should go.

Even more significant, in the same Sixth Circuit opinion, the three-judge panel (including conservative Judge Boggs)³⁶ rejected the contrary

³⁰ See Plaintiffs’ Motion for Temporary Restraining Order, *Citizens Alliance for Secure Elections*, No. 1:04CV2147, <http://news.lp.findlaw.com/hdocs/docs/election2004/casevu102504mot.pdf>.

³¹ See Order, *Citizens Alliance for Secure Elections*, No. 1:04CV2147 (order denying TRO), <http://moritzlaw.osu.edu/electionlaw/docs/citizensalliance.pdf>; see also *Lucas County Democratic Party*, 341 F. Supp. 2d at 864 (declining to mandate the registration of aspiring voters who neglected to complete a box on the registration form with their Social Security or driver’s license information).

³² See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574, 578–79 (6th Cir. 2004) (settling an important pre-election-day question concerning whether a ballot cast outside a voter’s home precinct could be counted).

³³ Directive 2004-33 from J. Kenneth Blackwell, Ohio Sec’y of State, to All County Boards of Elections 1 (Sept. 16, 2004).

³⁴ See generally Gary Martin, *Court Battle over Election Is Already On*, SAN ANTONIO EXPRESS-NEWS, Oct. 25, 2004, at 1A (noting that the Democrats had requested the courts to count the votes of people who received their provisional ballots from the incorrect precinct).

³⁵ See *Sandusky County Democratic Party*, 387 F.3d at 576.

³⁶ See *id.* at 567.

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amicus argument from the U.S. Department of Justice³⁷ and unanimously ruled that individuals have a private right of action to seek relief from HAVA violations.³⁸ This technical ruling of court jurisdiction had major implications for any HAVA-based litigation that might have arisen after election day. Specifically, it meant that Democrats, if it would be in their interest to do so, could bring a lawsuit arguing that HAVA embraced the substantive vision of provisional voting, at least as far as requiring the state to count provisional ballots if the individuals who cast them were substantively eligible (notwithstanding any procedural defects that might have occurred in the submission of their registration forms).³⁹

The Sixth Circuit's "private right of action" ruling did not guarantee that the Democrats would win this specific argument, but it guaranteed that the courts would listen, thus positioning this issue at the very forefront of debate if election day returns were close enough that provisional ballots might make a difference. Again, the Democrats determined that they would have the moral high ground if this potential dispute turned out to matter: how can provisional votes be thrown out on a technicality when there is no doubt that the individuals who cast them are qualified to exercise the franchise and the individuals stood in line on election day to do so? In anticipating this argument, the Democrats did not know just how long the lines in Ohio would prove to be,⁴⁰ which turned out to add even more moral force to their line of reasoning. But even without this added element to their claim, the Democrats figured that judges—and the public at large—might be hard pressed to discard ballots actually cast by individuals who were substantively eligible to vote but who simply incorrectly filled out a form, as many individuals have done on occasion.

For their part, the Republicans demonstrated before election day that they were not averse to litigating issues that might help President Bush win re-election. Most dramatically, they filed preelection challenges to 35,000 new Ohio registrants, seeking their removal from the registration rolls on the ground that campaign fliers came back "Return to Sender" when the Republicans mailed them to the addresses identified on these new

³⁷ See Bill Sloat, *Justice Department Joins Balloting Lawsuit: Says Voters Should Go to Right Precincts*, PLAIN DEALER (Cleveland), Oct. 23, 2004, at A6 (referring to the contention in the administration's brief that only the attorney general can sue for injunctive relief under HAVA).

³⁸ *Sandusky County Democratic Party*, 387 F.3d at 572.

³⁹ See *id.* at 572–73 (emphasizing that "[t]he right to cast a provisional ballot . . . is no less amenable to judicial interpretation and enforcement than any other federal civil right").

⁴⁰ Some Ohio voters stood in lines for seven hours before having the opportunity to vote. See Albert Salvato, *Ohio Recount Gives a Smaller Margin to Bush*, N.Y. TIMES, Dec. 29, 2004, at A14. Long lines were typical for Ohio voters on November 2, 2004: all across the state, voters stood in line for hours. See Michael Powell & Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, WASH. POST, Dec. 15, 2004, at A1.

registration forms.⁴¹ When a federal district judge enjoined these preelection challenges as violating the due process rights of the registrants,⁴² the Republicans announced that they would instead challenge these new registrants on election day if and when the registrants arrived at their polling places to vote.⁴³

Litigation over the validity of these polling place challenges was still pending in the early hours of November 2, when Justice Stevens of the U.S. Supreme Court ruled that these challenges would not be barred categorically but, to make sure that they would not prevent eligible voters from exercising the franchise, the federal courts would be open throughout the day to review any complaints about improperly aggressive polling place challenges.⁴⁴ By mid-morning, when it was becoming clear that the lines at polling places in Ohio would be extraordinarily long, Governor Bob Taft called upon his fellow Republicans to forego their right to challenge voters at the polls.⁴⁵ But it is reasonable to assume that after election day, if the margin of victory from the initial returns had been narrow enough that provisional ballots might have made a difference, Republicans would have been prepared to press the argument that the State should not count provisional ballots failing to satisfy strict and narrow standards.

Indeed, Republicans filed one such lawsuit late in the day on November 2, when it looked like such a scenario might be developing.⁴⁶ Although the complaint filed in *Schering v. Blackwell*⁴⁷ was little more than a placeholder, without much of an argument about how to properly treat provisional ballots,⁴⁸ it demonstrates that Republicans were ready to fight over the standards for evaluating these ballots. Not only would Republicans have fought against the lenient treatment of provisional ballots as a general proposition had it become necessary to do so, but they most likely would have questioned each and every provisional ballot ruled eligible for inclusion and objected to any ballots that the State plausibly

⁴¹ See *Miller v. Blackwell*, 348 F. Supp. 2d 916, 918 (S.D. Ohio 2004).

⁴² See *id.* at 922.

⁴³ Lisa A. Abraham, *Most Challenges Halted: Registration Hearings Blocked in Cuyahoga County. Summit's to Go On*, AKRON BEACON J., Oct. 28, 2004, at A1.

⁴⁴ See *Spencer v. Pugh*, 125 S. Ct. 305, 305 (2004).

⁴⁵ See Gregory Korte, *Dreary Day Goes Smoothly at Polls: Biggest Headache? Standing in Line*, CINCINNATI ENQUIRER, Nov. 3, 2004, at 1 (referring to Governor Taft's national announcement that Republicans at the polls in Ohio had been asked to act primarily as observers rather than as challengers of local voters).

⁴⁶ See Lisa A. Abraham, *Provisional Ballots Still to Be Verified: Valid Votes Won't Likely Alter Ohio's Local Races*, AKRON BEACON J., Nov. 4, 2004, at A1 (referring to the date that the complaint was filed and to the contention that Ohio Republicans backed Schering's suit).

⁴⁷ Complaint for Declaratory and Injunctive Relief, *Schering v. Blackwell*, No. 1:04-cv-755 (S.D. Ohio 2004).

⁴⁸ See *id.* ¶¶ 1, 10–13.

could disqualify, in a manner similar to the claims that Republicans raised in *Schering v. Blackwell*.⁴⁹

III. Uncertain Standards but a Certain Deadline

If such postelection litigation over provisional ballots had occurred in Ohio, it is difficult to predict with certainty how that litigation would have unfolded. On the question of whether HAVA requires the counting of provisional ballots cast by substantively qualified voters who simply submitted incomplete registration forms, the outcome in the Sixth Circuit likely would have depended upon the particular three-judge panel hearing the case. Indeed, the public's confidence that the judiciary could fairly resolve this important question according to the dictates of the law, rather than each judge's personal desires concerning the outcome of the election, almost certainly would have been severely impaired by any evidence that judges differed in their answer to this question depending upon the party affiliation of the president who appointed them.

But the Sixth Circuit would not have had the last word, and there would have been multiple pathways to potential U.S. Supreme Court litigation over provisional voting.⁵⁰ Even if the Sixth Circuit would have interpreted HAVA as not imposing the substantive vision of provisional voting on the states, the question would have remained whether Ohio law would have adopted the substantive rather than the procedural vision—at least with respect to the question of provisional votes cast by individuals who submitted incomplete registration forms.⁵¹ This question of Ohio law would have been a tricky one because Ohio law had never contemplated provisional ballots in this particular circumstance—Ohio's pre-HAVA version of provisional voting applied only in situations where previously registered voters had failed to submit a change of address, and Ohio's legislature had not adopted any new laws regarding provisional voting in the wake of HAVA.⁵²

Moreover, the lack of statutory guidance in Ohio law on this question would have invited different counties within the state to handle the question differently. Even if Secretary of State Blackwell had attempted to impose uniformity among the counties on this issue, the historical autonomy of counties regarding election matters—together with the absence of any

⁴⁹ See *id.* ¶¶ 6–7 (referring to the provisional ballots to be counted, “if at all,” following the election and referring to the potential effect of these ballots on the race's outcome).

⁵⁰ See, e.g., *Spencer v. Pugh*, 125 S. Ct. 305, 305 (2004) (referring to the plaintiffs' appeal to Justice Stevens in his role as a Circuit Justice with respect to emergency appeals).

⁵¹ See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004) (“[T]he ultimate legality of the vote cast provisionally is generally a matter of state law.”).

⁵² See OHIO REV. CODE ANN. § 3503.16 (Anderson 2001).

statutory specification—would likely have caused variations among counties to proceed in their treatment of provisional ballots.⁵³ Some counties would have let provisional voters supplement their incomplete registration forms by submitting the missing information on election day or perhaps even a few days later, while other counties would have taken a hard line on the question, saying that because these provisional voters had never become officially registered, they were ineligible to participate in the election.

The discrepancies among counties concerning provisional voting would have prompted litigation based on the equal protection theory of *Bush v. Gore*.⁵⁴ It would have been difficult for the U.S. Supreme Court to avoid this *Bush v. Kerry* variation on the same equal protection theme. How could the Court look principled if it were willing to consider one such equal protection argument but not another of such obvious similarity?⁵⁵

An even bigger potential problem, however, is that the clock likely would have run out before all the legal issues over provisional ballots could have been resolved, as the clock ran out on the recount of residual votes (hanging chads and the like) in the 2000 election in Florida.⁵⁶ Federal law sets a deadline by which controversies over a state's Electoral College votes must be resolved if that state is to be protected against scrutiny when Congress formally counts all of the states' Electoral College votes in January.⁵⁷ In 2000, the federally specified "safe harbor" date was December 12.⁵⁸ In 2004, it was December 7.⁵⁹

In *Bush v. Gore*, the U.S. Supreme Court stopped the recount process, rather than returning the issue to Florida for compliance with the Court's new pronouncement on the requirements of the Equal Protection Clause, because the "safe harbor" date was at hand by the time of the Court's decision.⁶⁰ There is every reason to think that disputes in 2004 over the eligibility of provisional ballots in Ohio still would have been pending on December 7 if these ballots could have made a difference as to the winner

⁵³ See generally Dao et al., *supra* note 6 (noting the Ohio counties' differing approaches to counting provisional ballots, especially with respect to the extent that each county checks old registration records to validate ballots).

⁵⁴ *Bush v. Gore*, 531 U.S. 98, 104–06 (2000).

⁵⁵ For further development of this point, see Edward Foley, *The Nine in a Pickle*, N.Y. SUN, Oct. 28, 2004, at 11.

⁵⁶ See *Ballots, the Courts and Genes*, ORLANDO SENTINEL, Dec. 31, 2000, at G5 (explaining that "the deadline for selecting the state's electors was at hand, [and thus] there was not enough time to order a [constitutional] recount").

⁵⁷ See 3 U.S.C. § 15 (2000).

⁵⁸ *Id.* § 5; see also Lynn Sweet, *Least of Gore's Problems Is Blowing State Deadline: The Selection of Florida's 25 Electors Scheduled for Today*, CHI. SUN-TIMES, Dec. 12, 2000, at 7.

⁵⁹ 3 U.S.C. § 5; see also Niquette, *supra* note 9.

⁶⁰ *Bush v. Gore*, 531 U.S. 98, 122 (2000).

of the state's Electoral College votes. As it was, Ohio did not finish its initial evaluation of these provisional ballots until December 6, when Secretary of State Blackwell certified the results of the election.⁶¹ This late certification left no opportunity to challenge any provisional ballot as improperly included or excluded.

Certification and the challenges to provisional ballots might have been accelerated had it appeared that the ballots could have affected the outcome of the election. Even so, it seems highly unlikely that all disputes about the eligibility of provisional ballots in Ohio—of which there were over 150,000⁶²—could have been resolved conclusively by December 7. Not only would there have needed to be a definitive resolution of the general standards for making these eligibility determinations—under HAVA and state law, as well as in accordance with equal protection principles⁶³—but it also would have been necessary to correctly apply these general standards to the eligibility determinations for all 158,642 ballots.

It seems far more likely that Ohio would have been somewhere in the middle of this process on December 7, 2004. After all, the dispute over ballots in Washington State, where the certified margin of victory in the governor's race was 129 votes, extended long beyond that date.⁶⁴ If the U.S. Supreme Court had been required to stay true to its position on the "safe harbor" deadline,⁶⁵ the evaluation of provisional ballots simply would have stopped midstream on December 7, with the consequence that no one would ever really know who won the election in Ohio.

The idea that one would call it quits when there is still work to be done seems particularly awkward in the context of counting ballots. Some ballots may have been included in the count that should have been excluded, and other ballots may have been excluded that should have been included. Either way, there is an arbitrary quality to declaring victory for the candidate who happens to be ahead in the middle of the process, when completion might have shown the other candidate to be the actual winner.

Stopping midstream also undercuts the provisional nature of provisional voting. If a provisional ballot is left uncounted because there is

⁶¹ Press Release, Ohio Sec'y of State, Blackwell Certifies Statewide Election Results (Dec. 6, 2004), <http://www.sos.state.oh.us/sos/news/release/12-06-04.htm>.

⁶² OHIO SEC'Y OF STATE, PROVISIONAL BALLOTS: NOVEMBER 2, 2004: OFFICIAL RESULTS, <http://www.sos.state.oh.us/sos/results/2004/gen/provisional.htm> (last visited June 13, 2005). According to the Ohio secretary of state's web site, there were 158,642 provisional ballots issued, of which 123,548 were deemed valid. *Id.*

⁶³ *See Gore*, 531 U.S. at 104–06.

⁶⁴ *See Rossi Team Issues List of "Felon" Voters*, SEATTLE TIMES, Mar. 4, 2005, at A1. Dino Rossi "won the initial count by 261 votes and a machine recount by 42 votes. But after a hand recount, [Christine] Gregoire was declared the winner by 129 votes." *Id.* Following the hand recount, "Rossi and other Republicans filed a lawsuit . . . alleging that the election was flawed." *Id.* The litigation was not resolved until June 6, 2005.

⁶⁵ *See supra* note 60 and accompanying text.

insufficient time to complete the process of evaluating its eligibility, casting the provisional ballot seems tantamount to being turned away at the polls, thereby defeating the essential purpose of provisional voting. Likewise, if a provisional ballot is counted without sufficient time to verify its eligibility, it is rather like giving a regular ballot to an individual of questionable eligibility with no opportunity to contest the ballot as an invalid vote.

Although the margin of victory in Ohio eliminated a potential situation in which the underdeveloped system of provisional voting became a mockery in light of the “safe harbor” deadline, the fact that Ohio in 2004 came so close to this scenario demonstrates the need to fix the current system of provisional voting before the next presidential election.

IV. Designing a Preelection Process to Avoid Postelection Fights

The most important reform that would reduce the potential for postelection litigation over provisional ballots is the development of clear rules for determining when provisional ballots are to be counted. Congress should definitively resolve, one way or the other, whether HAVA imposes the substantive vision of provisional voting or instead requires adherence only to the more modest procedural vision. Assuming the latter, every state should clarify its laws to remove any doubt as to whether each state embraces the procedural or substantive vision.

Beyond this clarification, however, there is reason to prefer the procedural vision if it is implemented in a way that provides fair notice to voters of what they must do to become—and to stay—registered. The danger of the substantive vision is that it opens up the possibility of lengthy and complicated postelection controversies over the eligibility of individual voters. If a state has a large number of provisional ballots in a given election—like the 150,000-plus provisional ballots⁶⁶ that amounted to almost three percent of all ballots cast in the presidential election in Ohio in 2004⁶⁷—there is a significant chance that the outcome of a presidential election could hinge on the postelection scrutiny of these ballots. There would be little public confidence that this official scrutiny is objective and without regard to the desire of particular officials to see one candidate or the other prevail. Moreover, the sheer volume of these ballots makes it likely that the state would bump up against the Electoral College “safe harbor” deadline.⁶⁸ Even if the state unambiguously embraced the substantive vision, thereby removing that issue from dispute, the task of processing 150,000 ballots in accordance with the substantive vision—with

⁶⁶ See *supra* note 62.

⁶⁷ See *supra* note 61 (listing the number of Ohio votes cast for each presidential candidate, totaling approximately 5.6 million votes).

⁶⁸ See 3 U.S.C. § 5 (2000).

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inevitable disputes over whether the individuals who cast them are qualified or not—might still cause the clock to run out before the process is complete.

By contrast, if there is a fair process for resolving voter eligibility questions before election day, the procedural vision of provisional voting can determine expeditiously after the election whether an individual is eligible: the procedural vision will simply look back to the preelection resolution of the same eligibility issue. Suppose, for example, that a state develops a preelection hearing in which an individual is adjudicated to be an eligible voter. In that situation, the voter would then be added to the list of registered voters, entitling the individual to vote a regular rather than provisional ballot. In the unlikely circumstance that, notwithstanding this determination, an administrative error occurs and the individual is never added to the list of registered voters that poll workers receive on election day, the individual would cast a provisional ballot. Afterwards, once the voter demonstrated that the preelection eligibility determination had already been made, the provisional ballot would be ruled valid for counting with no further examination of eligibility required. The procedural verification of the preelection determination would suffice; there would be no need to redo the substantive inquiry already made in the earlier determination.

Conversely, if the preelection determination ruled the individual ineligible, that determination should also be conclusive in the postelection context, as long as the preelection ruling was made in a fair proceeding in which the individual had adequate notice and an opportunity to present a case in favor of eligibility. This ruling of ineligibility would mean that the individual is not entitled to cast a regular ballot, and should the individual insist on casting a provisional ballot, the state should expeditiously exclude that ballot from the count based on the same fair preelection ruling of ineligibility. Anticipating the argument that in the context of evaluating the provisional ballot this individual should get a second chance to demonstrate substantive eligibility, the response is that there would be no reason to expect the postelection ruling to reach a different outcome if the preelection proceeding had indeed been fair. On the contrary, to reopen the substantive eligibility issue in the postelection context would only invite partisan manipulation at a stage in the election process when one side is striving mightily to maximize the number of provisional ballots ruled valid for counting while the other side is trying just as hard to do the opposite.

In this regard, it is worth noting that the procedural vision of provisional voting, in making fair preelection eligibility determinations conclusive, would work to protect voter rights from postelection abuse. If and when a voter had received a preelection ruling of eligibility, no other individual or group would be able to challenge that voter's eligibility after the election. Once the voter produced documentation of the preelection

ruling, that voter's ballot would count, and there would be no further inquiry.⁶⁹

Conclusion: The Future Depends on a Feasible Fix

This Article is not the place to detail the criteria necessary to make preelection eligibility determinations qualify as fair. Suffice it to say that whatever those criteria are, their implementation would enable a procedural vision of provisional voting to serve as an "insurance policy" against administrative error while operating efficiently and transparently to minimize the danger of running up against the Electoral College "safe harbor" deadline. If an individual were inadvertently dropped from the rolls without a preelection hearing to make a case for reinstatement, there would be no fair preelection determination binding in the postelection context, and the state would count a provisional ballot once it was shown that the voter was wrongly removed from the rolls. But for all those voters who received fair preelection hearings, the evaluation of provisional ballots should be straightforward and automatic. Indeed, the volume of provisional ballots is likely to diminish significantly if such preelection proceedings are put in place.

The combination of fair preelection proceedings with the procedural vision of provisional voting thus offers the proverbial best of both worlds. It provides the safety net that is essential in the event of erroneous purges without notice, of the kind that occurred in 2000. At the same time, it establishes a preelection mechanism that minimizes the need for a postelection safety net.

There was no such preelection mechanism in place in 2004, with the consequence that the safety net was in significant danger of unraveling—and thus failing to serve its intended purpose—if circumstances had put it to the test. The same danger will continue to exist as long as the system of provisional voting remains unchanged. There is time to make the changes necessary to avoid this problem for the next presidential election. Let us hope that our legislative leaders, in both Congress and the states, have the wisdom to act before it is too late.

⁶⁹ I have further developed the idea of verifying preelection registration lists, as a substitute for postelection evaluation of provisional ballots, in a series of editorials. See Edward B. Foley, *Verifying Voter Registration Lists* (Mar. 22, 2005), <http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0322.html>; Edward B. Foley, *Verifying Voter Registration Lists, Part 2* (Mar. 29, 2005), <http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0329.html>; see also Edward B. Foley, *The Provisional Ballots of Unregistered Voters* (Apr. 5, 2005) (relating the postelection evaluation of provisional ballots to the preelection system of verifying registration), <http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0405.html>.